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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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# No. 913

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ADIRONDACK TRANSIT LINES, INC.,
*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM BY APPELLEE, HUDSON & MANHATTAN RAILROAD COMPANY.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**CIVIL 26-508**

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ADIRONDACK TRANSIT LINES, INC.,
*Plaintiff-Appellant,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
*Defendants-Appellees.*

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## STATEMENT AGAINST JURISDICTION INCLUDING MOTION TO AFFIRM

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Pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, Hudson & Manhattan Railroad Company, intervenor-defendant-appellee herein, files its Statement against Jurisdiction, including its Motion to Affirm. The ground of said motion is that the questions presented by plaintiff-appellant's Statement as to Jurisdiction are not, as required by paragraph 1 of said Rule, substantial.

### Nature of Case

This is an appeal from the order, judgment and decree of November 4, 1944, of the above Court, dismissing the petition of the plaintiff-appellant which sought to enjoin that portion of an order of the Interstate Commerce Commission, dated June 6, 1944, which directs the plaintiff-appellant to cease and desist from its motor bus operations between New York, N. Y. and Weehawken, N. J., via the Lincoln

Tunnel, and, in Weehawken, N. J., between the New Jersey entrance to the Lincoln Tunnel over Boulevard East to its junction with Pershing Road. Such cease and desist order was made in a complaint proceeding before said Commission, known as Docket MCC-164.

The Commission, on June 4, 1937, in a proceeding known as No. MC-2835, had issued a certificate to plaintiff-appellant pursuant to the provisions of the "grandfather" clause of Section 206(a) of the Interstate Commerce Act. The portions of that certificate here pertinent read as follows:[1]

"Certificate

* * * * * * *

After due investigation:

*It appearing,* * * * *that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since that time; and the Commission so finding: therefore,*

*It is hereby certified,* * * * applicant * * * is hereby, authorized (to operate) * * *, as a common carrier by motor vehicle of passengers * * *, over the regular routes, between the fixed termini, *and to or from the intermediate points,* specified below:

> Between Saranac Lake, N. Y., and New York, N. Y. * * * thence over New Jersey highway S 5, New Jersey highway 1, and (*from Fairview, N. J.*) *unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York,* and return over the same route. (Emphasis and interpolation supplied.)

Defendant's "grandfather" application, filed January 31, 1936, described that portion of its route extend-

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[1] The quoted excerpt from the certificate is taken from the Commission's report of June 6, 1944, as shown on Sheet 2 of Exhibit E, attached to the petition of the plaintiff-appellant herein.

ing between Fairview and New York, which is the segment in controversy,[2] as follows:

> From Fairview to Weehawken Ferry via Hudson County Boulevard and East Boulevard. Then by ferry to New York City. The return route to be the same.

The record before the Commission showed, without contradiction, that prior to June 1, 1935, and at the time of the issuance of such certificate, and thereafter until the opening of the Lincoln Tunnel on or about December 22, 1937, the plaintiff-appellant had operated its motor bus service across the Hudson River between Weehawken, New Jersey and Forty-second Street, New York City, via the Forty-second Street Ferry of the West Shore Railroad. Upon the opening of the Lincoln Tunnel, the plaintiff-appellant, without further authority from the Commission, undertook to operate its motor bus service via the Lincoln Tunnel instead of such ferry. In the complaint proceedings referred to before the Commission in which the cease and desist order sought to be enjoined was made, plaintiff-appellant contended that the Commission's "grandfather" certificate of June 4, 1937, is to be construed as authorizing such motor bus operation by it via the Lincoln Tunnel, particularly in view of certain subsequent conduct of the plaintiff-appellant and of the Commission.[3]

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[2] See italicized portion of route description in last paragraph of above-shown excerpts from certificate."

[3] The nature of the conduct of the plaintiff-appellant and of the Commission in this respect will not be set out, since, as will be shown later herein, even if such conduct warranted the construction contended for by the plaintiff-appellant of the Commission's "grandfather" certificate, that certificate, if so construed, would be beyond the Commission's authority. The nature of such conduct, however, is fully set out in the Commission's report of June 6, 1944, attached as Exhibit E to the petition of the plaintiff-appellant herein. It is also set forth in the Statement against Jurisdiction, filed by the defendants-intervenors-appellees, Manhattan Coach Line, Inc. et al.

In the Commission's report of June 6, 1944 (Ex. E attached to plaintiff-appellant's petition herein) on which the Commission based its cease and desist order of the same date, here sought to be enjoined, the Commission rejected such construction of its "grandfather" certificate of June 4, 1937, and held that such certificate authorized operation by plaintiff-appellant only via the Forty-second Street Ferry.

The petition of the plaintiff-appellant before the District Court seeking to enjoin the Commission's cease and desist order, in substance asked the District Court to set aside the Commission's construction of its "grandfather" certificate of June 4, 1937, and to construe said certificate as authorizing operation via the Lincoln Tunnel.

The District Court, by its *per curiam* opinion and its conclusions of law, held in substance:

1. The Commission probably lacked power to grant a "grandfather" certificate pursuant to 49 U. S. C. A., Sec. 306, which would authorize the use of a facility (the Lincoln Tunnel) not in existence in or prior to 1935, or even at the time of the issuance of the certificate. Accordingly, if possible, the certificate should be so construed as not to authorize such use, and the certificate can be so construed.

2. The words in Sec. 306, "within the territory," refer to carriers which, in the required period, had, in whole or in part, no regular routes, and the plaintiff did not come within that category.

3. The certificate does not authorize transportation under, but merely "across" the river.

4. If there is any ambiguity in the Commission's certificate, the Commission's interpretation of its certificate cannot be disregarded by the courts unless such interpretation is clearly erroneous or arbitrary, and the Commission's interpretation is neither.

5. The failure of the Commission to act on the application of December 23, 1937[4] is not the equivalent of Commission action. It is irrelevant that no such action was taken because Division 5 thought an order superfluous.

It is submitted that, on the following grounds, the statement as to jurisdiction filed by plaintiff-appellant presents no substantial questions of the validity of the findings of fact and the conclusions of law of the District Court, and that the order, judgment and decree of the District Court should, therefore, be affirmed.

## Grounds of Motion to Affirm

*The statement as to jurisdiction fails to present any substantial question as to the validity of conclusion of Law No. 1 of the District Court. In the absence of a showing of any substantial question as to the validity of conclusion of Law No. 1 any questions as to the validity of the other conclusions of law of the District Court are irrelevant.*

*The decisions of the Supreme Court of the United States conclusively establish the validity of Conclusion of Law No. 1.*

It is to be noted that the statement as to jurisdiction makes no attempt whatever to show that the District Court was wrong in its Conclusion of Law No. 1 that

> "The Commission probably lacked power to grant a certificate pursuant to 49 U.S.C.A., Sec. 306, which authorized the use of a facility not in existence in or prior to 1935, or even at the time of the issuance of the certificate."

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[4] The District Court obviously intended to refer to the application of December 21, 1937, which was an application by plaintiff-appellant for a change in route, via the Lincoln Tunnel. See Exhibit D-1 attached to petition of plaintiff-appellant herein.

The statement as to jurisdiction makes no reference to this Conclusion of Law, except to state (p. 11) that

> "The Three Judge Court raised the question of whether the Interstate Commerce Commission could grant the authority the plaintiff claims it received, but did not affirmatively reach a conclusion on that point."

Since the Statement as to Jurisdiction makes no other reference to such Conclusion of Law No. 1, it would appear that the plaintiff-appellant is under the impression that the fact that the District Court qualified its Conclusion of Law by the use of the word "probably", *ipso facto* raised before the Supreme Court of the United States a substantial question as to whether such Conclusion of Law was erroneous, and consequently it was unnecessary for the Statement as to Jurisdiction even to attempt to show that any substantial question was otherwise presented as to the validity of such Conclusion of Law. In this, it is submitted, the plaintiff-appellant is in error. In the absence of any attempt whatever in the Statement as to Jurisdiction to show that Conclusion of Law No. 1 of the District Court was erroneous, not only is no substantial question as to the validity of such Conclusion of Law presented by the Statement as to Jurisdiction, but that Statement thereby fails to present any substantial questions as to the validity of the other Conclusions of Law of the District Court since such other Conclusions of Law are irrelevant unless Conclusion of Law No. 1 is erroneous.

That Conclusion of Law No. 1 is unquestionably valid is shown by a reference to the relevant portions of Section 306, and to the decisions of the Supreme Court of the United States construing that section.

The so-called "grandfather" clause is contained in Section 306(a) of Title 49, U. S. C. A., popularly known as Sec-

tion 206(a) of the Interstate Commerce Act. The pertinent provisions thereof read as follows:

> "*Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest *was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory* for which application is made and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, * * *". (Italics supplied.)

Unquestionably, plaintiff-appellant was not, on June 1, 1935, or at the time of making application for a "grandfather" certificate, or when such certificate was issued, i.e., June 4, 1937, in bona fide operation over any route which included the Lincoln Tunnel, since the Lincoln Tunnel was not opened for operation until on or about December 22, 1937.

However, it might be contended that the plaintiff-appellant was in bona fide operation on June 1, 1935, "within the territory" in which the Lincoln Tunnel was subsequently opened for operation, and therefore was entitled to a "grandfather" certificate.

The District Court, however, held in its opinion that

> "The words in Sec. 306 "within the territory", refer, we think, to carriers which, in the required period, had, in whole or part, no regular routes; and the plaintiff did not come within that category."

This construction put by the District Court upon the words "within the territory" in Sec. 306, is conclusively supported by the construction put upon those words by the Supreme Court of the United States in *United States* v.

*Maher*, 307 U. S. 148. In that case, the Supreme Court said, (p. 158):

> "In differentiating between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory', Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208(a) 49 U. S. C. A. #308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."
>
> (See also *United States et al.* v. *Carolina Freight Carriers Corp.*, 318 U. S. 475, 480.)

Finally, in this connection, the Supreme Court of the United States has specifically held that the "grandfather" clause was intended to provide for

> "• • • substantial parity between future operations and prior bona fide operations." (*Alton R. Co.* v. *United States*, 315 U. S. 15, 22.)

Otherwise, as the Supreme Court said in *Noble* v. *U. S.*, 319 U. S. 88, 91,

> "The 'grandfather' clause would be utilized not to preserve the position which the carrier has obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935."

It is accordingly submitted that not only does the Statement as to Jurisdiction fail even to attempt to present any

substantial question as to the validity of Conclusion of Law No. 1 of the District Court, but that any such question is precluded by the cited decisions of the Supreme Court of the United States. It is further submitted that thereby all other questions sought to be presented by the Statement as to Jurisdiction become unsubstantial and irrelevant.

WHEREFORE, it is respectfully prayed that the decree and judgment of the District Court be affirmed.

Respectfully submitted,

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December 19, 1944.